

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2007 Session

**THE METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, TENNESSEE v. GRAY'S DISPOSAL CO., INC.**

**Appeal from the Chancery Court for Davidson County
No. 06-1111 Ellen Hobbs Lyle, Chancellor**

No. M2007-00073-COA-R3-CV - Filed March 6, 2008

The sole issue presented on appeal is the application of the statute of limitations. The Metropolitan Government of Nashville and Davidson County [hereinafter "Metro"] brought suit against Gray's Disposal Company [hereinafter "Gray's"] to recover tipping fees incurred for the disposal of waste at Metro's Thermal Plant. The complaint alleged that Gray's breached an express and implied contract to pay the tipping fees incurred from July 1998 until August 21, 2002. The trial court found that Metro's claim was barred by the application of Section 28-3-105(3) Tennessee Code Annotated and dismissed their claim. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and ANDY D. BENNETT, J., joined.

J. Brooks Fox and Elizabeth A. Sanders, Nashville, Tennessee, for appellant, The Metropolitan Government of Nashville and Davidson County, Tennessee.

Keith C. Dennen and Sharon O. Jacobs, Nashville, Tennessee, for appellee, Gray's Disposal Company.

OPINION

Factual Background

Gray's is a Tennessee Corporation engaged in the business of hauling solid waste. They utilized the services offered by Metro's Thermal Plant from July 1998 until August 21, 2002. The Metropolitan Code of Law §§ 10.20.200 and 10.20.287 established the amount of tipping fees that Metro was allowed to collect. On May 3, 2006, Metro filed a unified complaint against Gray's seeking unpaid tipping fees. Attached to the complaint was the Gray's entire account history. However, the only amounts sought were from August 2001 to August 2002, totaling \$63,994.90.

On August 24, 2006, Gray's filed a motion to dismiss pursuant to Tennessee Rules of Civil Procedure 12.02(6). Gray's alleged that the applicable statute of limitations is Section 28-5-105(3), and not Section 28-3-109(a)(3) which pertains to contractual action. The trial court concluded that Section 28-3-105(3) applied and granted Gray's motion to dismiss.

On appeal, Metro now claims that it seeks collection of these tipping fees on an open sworn account.

Standard of Review

When reviewing a dismissal of a complaint under Rule 12.02(6), the appellate courts must take the factual allegations contained in the complaint as true and review the trial courts' legal conclusions *de novo* without giving any presumption of correctness to those conclusions. Tenn. R. App P. 13(d); *Owens v. Truck Stops of America*, 915 S.W.2d 420, 422 (Tenn. 1996); *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

Analysis

Tennessee Code Annotated § 68-211-835 permits "each county, municipality, or solid waste authority which owns a municipal solid waste disposal facility or incinerator may impose a tipping fee upon each ton of municipal solid waste or its volume equivalent received at such solid waste disposal facility or incinerator." Tenn. Code Ann. § 68-211-835(a)(2006). The section further provides that "[t]he fee imposed may be equal to, or a portion of, the estimated cost of providing solid waste management services on a per ton or volume equivalent." *Id.* Tennessee Code Annotated § 7-54-103 provides that the "municipality shall charge for the production of any energy for such heating, cooling or processing and may combine it with any other energy produced." Subsection (e) of this section states that:

A municipality is authorized to establish, levy, and collect fees, rates, or charges in connection with:

- (1) the collection, delivery, sale, purchase or disposal, whether at the site of an energy production facility, a landfill, or otherwise, of solid waste; and
- (2) the output from an energy production facility.

Tenn. Code Ann. § 7-54-103(a)(2006). Both of these statutes are referred to in the Metro's ordinances as the authority for the tipping fee.

At the time these charges were incurred, Tennessee Code Annotated § 28-3-105 provided as follows:

Property tort actions – Statutory liabilities. – The following actions shall be commenced within three (3) years from the accruing of the cause of action:

* * * * *

(3) Civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefor, when no other time of limitation is fixed by the statute creating such liability.

Clearly the tipping fees imposed by Metro's ordinances are in conjunction with services performed. The monetary liability is imposed as a result of those services. Neither Tennessee Code Annotated § 68-211-835 nor Metro's ordinances create a time limitation. Therefore, as this action is based upon a state statute, the three-year limitation of section 28-3-105 applies and Metro's action is time barred.

Furthermore, Tennessee Code Annotated § 28-3-304, effective May 2004, provides: **Collection or reimbursement for underpayments or overpayments – Solid waste, garbage or refuse collection or disposal.** – Notwithstanding any other provision of law to the contrary, a municipality shall not refund an overpayment or collect amounts owed to a municipality as a result of an underpayment or nonpayment of any charge or fee imposed for solid waste, garbage, or refuse collection or disposal services if such overpayment, underpayment, or nonpayment is more than thirty-six (36) months past the date payment was first due.

And, Tennessee Code Annotated § 28-3-101 provides as follows:

Scope of chapter. – All civil actions, other than those for causes embraced in chapter 2 of this title, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided.

The cause of action before this court occurred more than thirty-six (36) months before the complaint was filed. Therefore, the complaint is time barred under Tennessee Code Annotated § 28-3-304.

Finally, Gray's seeks reimbursement for reasonable and actual expenses pursuant to Tennessee Code Annotated § 29-37-104(2)(A)(2), claiming that Metro's actions in filing this complaint were brought in bad faith and for the purpose of harassment. The trial court found that Metro's reliance on the six-year statute of limitations, pursuant to Tennessee Code Annotated § 28-3-109, was a "colorable claim" and not made arbitrarily or in bad faith. We agree with the trial court's conclusion, especially in light of the fact that no explicit time limitations were set in Tennessee Code Annotated §§ 68-211-835 and 7-54-103, which provide for the authorization of municipalities to charge fees.

Conclusion

We affirm the judgment of the trial court in all respects and assess the cost of this cause to the Appellant.

JON KERRY BLACKWOOD, SENIOR JUDGE